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Supreme Court of the United States

OCTOBER TERM 1961

No. 703

MADELINE C. SCHROEDER,

Appellant,

against

THE CITY OF NEW YORK,

Appellee.

BRIEF FOR NEW YORK CIVIL LIBERTIES UNION, INC., AS *AMICUS CURIAE*

NEW YORK CIVIL LIBERTIES UNION,
as *Amicus Curiae,*
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Supreme Court of the United States

OCTOBER TERM 1961

No. 763

MADELINE C. SCHROEDER,

Appellant,

against

THE CITY OF NEW YORK,

Appellee.

BRIEF FOR NEW YORK CIVIL LIBERTIES UNION, INC., AS *AMICUS CURIAE*

The New York Civil Liberties Union is an affiliate of the American Civil Liberties Union, a national non-profit organization devoted to the implementation of the rights guaranteed by the United States Constitution. Although it is concerned mostly with deprivation of personal rights it is also concerned with possible interference with property rights. It believes this to be such a case because of the inadequacy of the notice provided by the applicable statute. This brief is being filed with the consent of both parties.

Under Title K41 of the Administrative Code of the City of New York, the City instituted a proceeding to acquire the right to divert water of the Neversink River (fols. 34, 35). Notice of this proceeding was given by publication and posting only (fol. 37). The notices contained no reference to appellant or her property (fol. 38) other than a general reference to property along the river between certain points (see fols. 91, 92). The text of the published and posted notices appears in the record as Exhibit B (pp. 30-32). That merely called attention to an application for the appointment of Commissioners of Appraisal. It contained no indication that action was

required of any land owner. The statute provides machinery for the determination of claims but makes no provision for any valuations or payments in the case of non-claimants. It requires claims to be presented within three years after taking of title.

Appellant; being in ignorance of the pendency of the proceedings (fol. 40), filed no claim within the three year period (fol. 86). After the expiration of that period she brought suit to enjoin diversion of waters from her property (fol. 51).

Appellee's motion to dismiss the complaint on the ground that relief was barred by limitations (fols. 24, 25) was granted at Special Term (pp. 58, 59). The sole issue considered was the challenge to the sufficiency of the notice on constitutional grounds. That determination was upheld both by the Appellate Division of the New York Supreme Court and by a divided Court of Appeals.

The majority opinion of the latter Court (10 N. Y. 2d 522), after citing the cases in this Court relied on by appellant (*Mullane* v. *Central Hanover Tr. Co.*, 339 U. S. 306, and *Walker* v. *Hutchinson City*, 352 U. S. 112), rested its conclusion on its belief that the challenged diversion was "clearly apparent" before the expiration of the time within which claims might be filed. Two of the Judges dissented, pointing out that the publication had been made in rural communities far from the subject property and that the posting and publication had occurred in January, although it was known that much of the property affected was then vacant. It is significant, moreover, that, as pointed out by appellant in her jurisdictional statement, there is nothing in the record to support the statement of the majority that there had been any "clearly apparent" effect of the diversion within the time specified for the filing of claims. No such contention was made by the City in its answer.

Moreover, even if some change in the river had been apparent, a person in the position of appellant, a vaca-

tionist in the area, would not normally associate it with a diversion by the City but might more readily have attributed it to some natural cause, perhaps a temporary one.

In our view, however, the disposition of the case should not turn on any issue of the extent to which the diversion might have been noticeable at any given time or place. Property rights should not depend on such fleeting factors. Essentially, where a municipality seeks to condemn property and knows the names of the owners it should be required, at the very least, to mail written notice of the proposed legal proceedings to those owners. Such was the holding in *Mullane*. The attempted distinction by the New York Court of Appeals that here we are dealing with "the tangible and the visible" can lead only to confusion and injustice.

Let us suppose that the subject of this condemnation had been standing timber taken in the middle of winter, rather than merely water diversion. How was the property owner to know that this had been taken under a condemnation proceeding instituted by the City and not by some trespasser in the owner's absence, unless given notice by the City of what it was doing?

The rule enunciated in *Mullane*, requiring at least mail notice (339 U. S. at 319), can constitute no hardship to any condemning body. It should be the minimum consonant with due process in every case.

We, therefore, join appellant in urging reversal of the determination of the New York Court of Appeals.

Respectfully submitted,

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